BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 11.07.2022

CORAM

THE HONOURABLE MR.JUSTICE P.VELMURUGAN

A.S. (MD) No.643 of 2011

1.Karuppayee Ammal (Died)
2.Thiru.Ithayarajan
3.Thiru.K.Murugan (Died)
4.K.Selvarani
5.K.Shanthi
6.K.Poomayil
(Appellants 4 to 6 are brought on record
as Lrs of the deceased 1st appellant
vide Court order dated 14.09.2018) .... Appellants/Defendants

Vs.

1.V.Muruganantham ... Respondent/Plaintiff
2.Usharani
3.Minor.Manju
4.Minor.Balasivasakthi
(Minors respondents 3 & 4 are represented by
their mother and natural guardian the
2nd respondent herein)
(R2 to R4 are brought on record as Lrs
of the deceased 3rd appellant vide order
dated 18.07.2012)

PRAYER: Appeal Suit filed under Section 96 r/w Order 43 Rule 1 of the Civil Procedure Code, against the judgment and decree made in O.S.No.44/2008, dated 24.06.2011, on the file of the Additional District & Sessions Judge/Fast Track Court No.III, Madurai.

For Appellants : Mr.N.Murugesan
For R1 : Mr.V.Meenakshi Sundaram
For R2 to R4 : No appearance

J U D G M E N T

The appellants are the defendants. The 1st respondent is the plaintiff. The 1st respondent filed a suit in O.S.No.44 of 2008, on the file of the Additional District Court, Fast Track Court No.III, Madurai, against the appellants/defendants for recovery of a sum of Rs.10,00,000/~ along with interest. The trial Court, by judgment and decree, dated 24.06.2011, passed a

preliminary decree for recovery of money. Challenging the said judgment and decree, the defendants, as appellants have filed this appeal.

2.Brief facts of the case of the 1st respondent/plaintiff, as per the plaint, are that the defendants 1 to 3 approached the plaintiff and requested him to arrange a loan of Rs.10 lakhs to meet their family expenses and also for their business. The defendants 1 to 3 assured the plaintiff that they would hand over the title deeds as additional security for the loan amount. Accordingly, on 01.03.2006, the defendants 1 to 3 jointly borrowed a sum of Rs.10 lakhs from the plaintiff and executed a promissory note in favour of the plaintiff, promissing to repay the principal together with interest at the rate of 12% p.a., on demand by the plaintiff or to his order. The defendants handed over the original sale deeds, dated 28.04.1980 and 25.10.1969 respectively and also the original power of attorney deeds, dated 25.03.1999 and 12.06.2000 respectively, to the plaintiff. To that effect, the defendants 1 and 2 made an endorsement on the back side of the promissory note. However, no charges were created in respect of the said property. Apart from the above said loan, the defendants 1 & 3 have jointly borrowed a sum of Rs.1 lakh from the plaintiff on 24.09.2004 and executed a registered mortgage deed. The defendants 1 & 3 now have filed a suit for redemption in O.S.No.28/2008 before the III Additional Sub Court, Madurai against the plaintiff on false and frivolous grounds. The defendants did not pay any amount towards the suit promissory note and hence, the present suit has been filed.

4. The defendants resisted the suit by filing a written statement stating that it is false to contend that the defendants 1 to 3 approached the plaintiff and requested him to arrange a loan of Rs.10 lakhs to meet their family expenses. The defendants never offered to handover the title deeds in respect of their property to the plaintiff. All the allegations contained in the plaint are false. It is false to contend that the defendants did not pay any amount either towards principal or interest inspite of repeated demands made by the plaintiff. The defendants 1 to 3 borrowed a sum of Rs.1 lakh from the plaintiff on 24.09.2004 after executing a simple mortgage deed in respect of their property situated in survey No.171/11A of Tirupparankundram Town Panchayat. Though the defendants approached the plaintiff and expressed their readiness to redeem the mortgage deed dated 24.09.2004, the plaintiff did not agree for the said proposal. Therefore, the defendants were constrained to issue a legal notice dated 20.10.2007 to the plaintiff and the same was received by the plaintiff. Since the plaintiff did not reply to the said notice, the suit for redemption of mortgage was filed as stated above. In order to grab the properties of the defendants, the plaintiff had forged the signatures of the defendants in the pro~note. The defendants never executed the suit promissory note. Infact, the plaintiff created the alleged promissory note in the name of one Murugan forging the signatures of the defendants and filed a suit in O.S.No.187/2007, which is pending. No consideration was passed for the suit promissory note. There is no cause of action for the present suit and therefore, the suit is liable to be dismissed.

5. On the basis of the above pleadings, the learned trial Judge framed

the following issues for consideration:
(i) Whether the defendants borrowed Rs.10,00,000/~ from the plaintiff on 01.03.2006 and executed a promissory note agreeing to repay the amount with interest at 12% p.a.?
(ii) Whether the suit pronote is a forged document?
(iii) Whether the plaintiff is entitled to the suit amount with future interest from the defendants?
(iv) To what other reliefs?

6. In order to substantiate the case, on the side of the plaintiff, two witnesses were examined as PW1 to PW2 and 12 documents were marked as Exs.A1 to Ex.A12. On the side of the defendants, 7 witnesses were examined as D.W.1 to D.W.7 and 14 documents were marked as Ex.B1 to Ex.B14.

7. After completing the trial and on hearing the arguments advanced on either side, the learned trial Judge, considered the evidence available on record, decreed suit as prayed for with costs directing the defendants to pay a sum of Rs.12,48,665/~ to the plaintiff together with interest at the rate of 9% p.a., from the date of plaint till the date of decree and thereafter, at the rate of 6% p.a., till the date of realisation.
8. The learned counsel appearing for the appellants would submit that the appellants have never borrowed a sum of Rs.10,00,000/~ from the respondent and executed a suit promissory note. Originally, the appellants borrowed a sum of Rs.1,00,000/~ from the respondent in the year of 2004 and executed a mortgage deed and after execution of the mortgage deed, when they are ready to pay the amount and redeem the mortgage, the respondent refused to receive the money. Therefore, they filed a suit in O.S.No.28 of 2008, on the file of the III Additional Sub Court, Madurai for redemption. Counter~blast to the said suit, the respondent has filed the present suit as if, the appellants had borrowed a sum of Rs.10,00,000/~ and executed a promissory note and also handed over all the original title deeds for collateral purpose. Further, he would submit that the appellants had never borrowed the amount and executed the promissory note and the property is worth about only Rs.2,00,000/~.

9. He would further submit that the thump impression of the first appellant found in Ex.A1~promissory note and the admitted signature found in the mortgage deed are not tallid each other. The admitted thump impression was sent to the Finger Print Expert and he gave an opinion that the thump impression of first appellant found in Ex.A1~promissory note is differed from Ex~A8 mortgage deed. The other appellants are used to put the signature in Tamil only and they are not putting their signature in english. Whereas, in the suit promissory note, the signatures of the other two appellants are found in english, which is also creates a doubt and the suit promissory note was created by the respondent with the help of one Murugan, who already filed a suit in O.S.No.187 of 2007 and that suit was dismissed. Therefore, at the instigation of the said Murugan and also the counter~blast to the suit filed by the appellants for redemption of mortgage deed, the respondent concocted the documents and filed the present suit for recovery of money.

10. Therefore, the respondent as the plaintiff has not proved his case

and the plaintiff cannot take the advantage of the loopholes when the appellants stoutly denied about the execution of the promissory note and it is the duty of the respondent/plaintiff has to prove his case. Whereas, in this case, the appellants denied all the signatures but the respondent has not taken any steps to prove the signature and thump impression found in the suit promissory note and they filed the other documents and that has not proved the execution of documents. Therefore, the trial Court has failed to consider the fact that the respondent has no means to lend a such huge money and also the loan borrowed by the appellants from the respondent is due and at the circumstances, how, he lend such a huge money. The appellants used to sign only in Tamil, whereas, in the suit promissory note, the signatures of the appellants found in English, but the trial Court has failed to consider the said fact.

11. Without any pleadings, the respondent deposed that he borrowed a sum of Rs.5,00,000/~ to some other person to lend the suit amount to the appellants and executed the mortgage deed, whereas, no such deed was filed in the present suit to prove that he borrowed the said amount by executing a mortgage deed and he has not examined the mortgagee with regard to the source of lending a huge amount of Rs.10,00,000/~ to the respondent. In view of the non~examination of the mortgagee and for non~production of the mortgage deed clearly shows that the respondent has not borrowed the suit amount and not handed over any document. Unfortunately, the trial Court miserably failed to consider the defence taken by the appellants and decreed the suit. Challenging the same, the appellants have filed the present appeal.

12. The learned counsel appearing for the respondent would submit that the appellants have not denied the acquittance with the respondent and also admitted the mortgage deed. The recitals in the mortgage deed does not contained that all the title deeds have been handed over to the respondent at the time of executing the mortgage deed as mentioned in Ex.B1 in the suit. But, whereas, in contrary, Section 92 of the Indian Evidence Act, they cannot lead oral evidence. Though, the other documents, namely, power of attorney was handed over at the time of execution of suit promissory note, but they have stated that they lost the power of attorney, but they have failed to prove that they have filed a complaint or action taken for missing of the document.

13. Further, he would submit that in order to prove the promissory note, the respondent himself was examined as P.W.1 and also scribe and one of the attestors to the promissory note was examined as P.W.2. They have clearly spoken about the execution of the promissory note and endorsement made in the promissory note and they handed over all the documents. He would further submit that the expert opinion is not a conclusive proof and it is an opinion of the expert. That has not been marked before the trial Court. The appellant has not called for the expert and has not given an opportunity to the respondent to cross~examine them. If the opportunity is given, they might have elucidated from the expert regarding variations. Since opportunity has been denied to them, they could not examine the expert. Even expert opinion is not a conclusive proof, it is a material to the Court to arrive at a conclusion.

14. Further, the appellants have not denied the means, even otherwise the respondent has proved that he was a tailor by profession and earning through his profession and also through the agricultural property. Further, the learned counsel for the respondent would submit that he used to borrow the money for lessor interest and lend money for higher interest and in that way, mortgaged the property and lend the money to the appellants. Further, he would submit that even they also admitted that there is several transaction between them, Ex.A10 and Ex.A11 clearly show that in that documents appellants 2 & 3 had signed in english and therefore, their defence is that they put their signature in english is not acceptable. The respondent has substantiate his plea that the habit of signing both english as well as Tamil. Therefore, the suit promissory note was proved by examining P.W.1 and P.W.2 and also marked all the documents and submitted for collateral purpose and endorsed in the back side of the document. Therefore, whatever the defence taken by the appellants, they have not substantiated the defence and therefore, under these circumstances, the trial Court fairly considered all the oral and documentary evidence and found that the respondent is having sufficient source of means to lend money and money borrowed by the appellants for a sum of Rs.1,00,000/~ in the year 2004 and executed the mortage deed and it is nothing to do with the suit promissory note in the present claim. The respondent proved his case and the appellants have not proved the defence and therefore, under circumstances, the appeal has to be dismissed.

15. Heard the learned counsel appearing for the appellants, the learned counsel appearing for the respondent, perused the pleadings, issues framed by the trial Court, oral and documentary evidence adduced and produced by both parties.

16. The case of the respondent is that the appellants borrowed a sum of Rs.10,00,000/~ and executed a suit promissory note Ex.A1. The said execution of the promissory note stoutly denied by the appellants. Therefore, once the execution and signature are denied, it is the duty of the respondent/plaintiff has to prove the same. No doubt, the respondent/plaintiff has adduced evidence by examining as a witness~P.W.1 and one of the witness to the promissory note was examined as P.W.2. When the appellants have taken a further defence that the signatures found in the promissory note are not of them. In order to disprove the case of the respondent, the appellants have filed an application to send the document Ex.A8 for expert opinion. The expert sending the opinion that both the thump impression and the signatures are differs and both are not one and the same. Further, the defence of the appellants is that the appellants 2 & 3 used to put the signature only in Tamil and not in english, whereas, in the disputed document, the signatures are found in english. Therefore, it also creates a doubt. Therefore, the respondent/plaintiff relied on the documents Ex.B~10, 11 & 12 are the signatures put by the appellants 2 & 3 in english. Even though the appellants denied the signatures, when the appellants have claimed that they are in the habit of putting the signature in english also and they have taken steps to compare with the diary marked under Ex.A10 along with the signature found in Ex.A1 suit promissory note, but they have not take any steps to examine the expert as witness. The learned counsel for the

respondent taken a stand that they have not summoned the expert, who has given opinion and marked the document through witness and no opportunity was given to cross~examine the expert. Therefore, in view of denying the opportunity, that document cannot be taken into consideration to decide the case and based on the document decision cannot be arrived.

17. Though the case of the appellants that they never borrowed money and never executed the document as already stated, the respondent have not taken any steps to compare the signature found in the disputed document Ex.A1~promissory note. Further, the appellants have stated that all the documents have handed over at the time of execution of Ex.A8 mortgage deed, but, whereas, the respondent has stated that they have not handed over the document at the time of execution of Ex.A8 which is also contrary to Section 92 of the Indian Evidence Act. Now, they cannot take a different stand that when the mortgage deed silent about the handing over the document, they clearly stated that they produced the same at the time of execution of Ex.A8. Appellants have already denied the execution of the document and handing over the document.

18. A reading of Ex.A8 mortgage deed it shows that originally, the first appellant and her husband are joint owners of the properties and therefore, the appellants 2 & 3 are the legal heirs of her husband, therefore, all the three persons have jointly executed a mortgage deed, but, whereas, the mortgage deed was executed only by two persons and the other persons executed a power of attorney Ex.A4 and without the knowledge of the power of attorney, they executed a mortgage deed. Therefore, the appellants have handed over the documents only at the time of execution of mortgage deed Ex.A8. When the document Ex.A1 was denied by the appellants and it is duty of the respondent/plaintiff to prove his case. It is a settled proposition of law that the respondent/plaintiff has to prove his case on his own strength and he cannot take advantage of the weakness of the defendants/appellants. When the appellants denied the source of the respondent, the respondent has stated that he mortgaged his property for a sum of Rs.5,00,000/~ and in addition to that, Rs.5,00,000/~ was borrowed from third party. Though the respondent has not specifically pleaded regarding the source of money, which was given to the appellants, but, in order to prove his case, during the evidence, he has stated that he borrowed a sum of Rs.5,00,000/~ by mortgaging his property and in addition to that Rs.5,00,000/~ was borrowed and gave it to the appellants. The respondent has not produced any document of mortgage or examination of mortgagee to prove his case and other persons from whom he borrowed the money and gave to the appellants.

19. Therefore, when the defendants/ appellants specifically denied that the document was forged, as a plaintiff/respondent has to prove the execution and also the consideration. When all the facts have been denied by the appellants, the respondent/plaintiff has to establish the same, but, whereas, the plaintiff has not established the same in the manner known to law. Even though, the respondent ought to have proved the same by examining the witnesses, but he has not proved the case. When the execution and signature are also stoutly denied, it is the duty of the plaintiff/respondent has to

prove that the defendants/appellants borrowed the amount mentioned in the suit promissory and they executed a promissory note and also put their signature in that. So in this case, though the opinion of the expert is not conclusive proof, the appellants have taken the steps to send the thump impression to the Finger Print Expert for getting opinion. Report also received from the Court. Neither it was marked through any witness or marked as Court documents. The report is available in the Court and the Court can looked into the document.

20. In support of the case, the learned counsel for the respondent has placed the reliance of Ramesh Chandra Agrawal vs. Regency Hospital Limited and others reported in (2009) 9 Supreme Court Cases 709.

21. Though it is the document regarding comparison of thump impression, whereas, the decision referred to by the learned counsel for the appellant is not for regarding the thump impression. No doubt, naturally, the expert is to be summoned for giving evidence. So far as the thump impression is concerned, even though, the expert has not been summoned and marked the document, once it has come to the Court, the opinion states that the thump impression found in the admitted document is differ from the disputed document, the Court has power to consider the same. Though the appellants have stated that they borrowed a sum of Rs.1,00,000/~ from the respondent and executed a mortgage deed Ex.A8 and they are ready to pay the money, he did not receive the money and hence, they filed a suit for redemption. The said suit is pending. Counter~blast to the said suit, the present suit has been filed. Ex.B1 and Ex.B2 which are clearly shows that already there is a loan transaction between the appellants and the respondent in the year 2004. The appellants and respondent have not paid any interest,then it is not believable that how the respondent lent such a huge amount of Rs.10,00,000/~ to the appellants. Under these circumstances, this Court finds that the respondent has not proved his case. When the execution and signatures have been denied, it is the duty of the plaintiff/respondent to prove the document and therefore, he cannot take advantage of the loopholes left by the defence taken by the appellants. Therefore, under these circumstances, a reading of Ex.A10, Ex.A11 and Ex.A12 which are not during the relevant period. The appellants have borrowed some more money from the respondent. Therefore, Ex.A10 would shows that even prior to the mortgage deed~ Ex.A8 there was a transaction in between both appellants and the respondent. This document does not go to show that after the mortgage , there was a transaction between the appellant and the respondent that pending mortgage deed, the appellants have borrowed money from the respondent.

22. Therefore, under these circumstances, this Court finds that the the respondent/plaintiff has failed to prove the same. The trial Court has failed to appreciate the entire evidence on the side of the appellants/defendants. The defendants need not prove the defence through direct evidence and it can be proved by preponderance of probabilities and the plaintiff/respondent cannot take advantage of the loopholes left by the defendants or weakness of the defendants. The plaintiff/respondent has to prove his case on his own strength. Therefore, under these circumstances this Court finds that the appeal is liable to be allowed. Accordingly, the

appeal is allowed and the judgment and decree of the Additional District & Sessions Judge/Fast Track Court No.III, Madurai passed in O.S.No.44 of 2008, dated 24.06.2011 are set aside. No costs.

11.07.2022

Index : Yes / No
Speaking Order : Yes / No
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To
1.The Additional District & Sessions Judge,
Fast Track Court No.III, Madurai.

2. The Section Officer,
VR Section,
Madurai Bench of Madras High Court,
Madurai.

P.VELMURUGAN, J.

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A.S. (MD) No.643 of 2011

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